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HON. ROBERT J. BRYAN
Trial Date: July 29, 2019

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON

AT SEATTLE

DONALD VARNEY and MARIA VARNEY, husband and wife, Plaintiffs, vs. AIR & LIQUID SYSTEMS CORP., et al., Defendants.	Civil Action No. 3:18-cv-05105-RJB **MOTION FOR SUMMARY JUDGMENT OF DEFENDANT FLOWSERVE US, INC., SOLELY AS SUCCESSOR-IN-INTEREST TO EDWARD VALVES, INC.** ORAL ARGUMENT REQUESTED Note on Motion Calendar: February 15, 2019

I. RELIEF REQUESTED

Pursuant to Fed. R. Civ. P. 56, Defendant Flowserve US, Inc., solely as successor-in-interest to Edward Valves, Inc., (hereinafter, "Edward Valves") requests that plaintiffs' claims be dismissed with prejudice because there is no evidence that decedent Donald Varney was ever exposed to asbestos from a product made or supplied by Edward Valves, or a product for which Edward Valves is legally responsible. Without that threshold evidence, there is no evidence supporting any of plaintiffs' tort-based claims, or their claims of willful and wanton conduct, concert of action and conspiracy, premises liability, extra-hazardous employment, or "any other

applicable theory of liability." Edward Valves is therefore entitled to summary judgment as a matter of law.

II. FACTUAL BACKGROUND

Plaintiffs allege that the decedent was exposed to asbestos and asbestos-containing products while working as a marine machinist at the Puget Sound Naval Shipyard and at the Hunter's Point Naval Shipyard, and while performing automobile and motorcycle repair work. Complaint, ¶ 54 (Dkt. 19-2). Plaintiffs alleged that 46 different product manufacturers, suppliers, and other entities are responsible for causing the decedent's asbestos-related disease and death. *Id.*, Caption. Plaintiffs' claim against defendants include product liability, negligence, strict product liability (Restatement (Second) of Torts § 402A and/or 402B), conspiracy, premises liability, and "any other applicable theory of liability," including, if applicable, product liability under RCW 7.72.et seq. *Id.*, ¶ IV.

However, there is no admissible evidence to support plaintiffs' claims that the decedent was ever exposed to an asbestos-containing product manufactured or introduced into the chain of commerce by Edward Valves. The decedent passed away on February 8, 2018[1] – before his deposition was taken. The decedent therefore provided no admissible evidence to support the allegations in the complaint. Plaintiffs also have come forward with no fact witness or other admissible evidence to show that (1) the decedent worked with or around a valve that was manufactured or sold by Edward Valves, (2) the valve contained original gaskets or packing sold by Edward Valves, and (3) the original gaskets or packing contained asbestos. Due to the absence of that evidence, Edward Valves is entitled to summary judgment and plaintiffs' claims should be dismissed.

ISSUES PRESENTED

1. Should plaintiffs' product liability claims against Edward Valves be dismissed with prejudice pursuant to Fed. R. Civ. P. 56 when there is no evidence that (a) the decedent was

[1] Carlton Dec., Ex. 1.

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exposed to an asbestos-containing product manufactured or supplied by Edward Valves; or (b) the decedent's disease was substantially caused by inhaling asbestos fibers released from a product manufactured or supplied by Edward Valves?

2. Should plaintiffs' product liability and negligence claims against Edward Valves be dismissed with prejudice when plaintiffs lack any admissible evidence that Edward Valves failed to warn the decedent regarding the hazards of asbestos in products manufactured or supplied by other entities.

3. Should plaintiffs' claims for willful and wanton conduct, concert of action and conspiracy, premises liability, extra-hazardous employment [former RCW 49.16.030], and "any other applicable theory of liability" against Edward Valves should be dismissed with prejudice when plaintiffs lack any admissible evidence in support of those claims?

III. EVIDENCE RELIED UPON

This motion is based upon the Declaration of Marc M. Carlton, and the exhibits attached thereto; the records and papers on file with the Court Clerk in this matter; and the law as set forth below.

IV. ARGUMENT

A. Summary Judgment Standard.

Summary judgment is appropriate if the evidence shows "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); *Galen v. Cty. of L.A.*, 477 F.3d 652, 658 (9th Cir. 2007). A fact is "material" if it might affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 91 L. Ed. 2d. 202, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). A factual dispute is " 'genuine' only if there is sufficient evidence for a reasonable fact finder to find for the non-moving party." *Far Out Prods., Inc. v. Oskar*, 247 F.3d 986, 992 (9th Cir. 2001)(citing *Anderson*, 477 U.S. at 248-49).

The moving party bears the initial burden of showing there is no genuine dispute of material fact and that it is entitled to prevail as a matter of law. *Celotex*, 477 U.S. at 323. If the

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moving party does not bear the ultimate burden of persuasion at trial, it can show the absence of such a dispute in two ways: (1) by producing evidence negating an essential element of the nonmoving party's case, or (2) by showing that the nonmoving party lacks evidence of an essential element of its claim or defense. *Nissan Fire & Marine Ins. Co. v. Fritz Companies, Inc.*, 210 F.3d 1099, 1106 (9th Cir. 2000). If the moving party meets its burden of production, the burden then shifts to the nonmoving party to identify specific facts from which a fact finder could reasonably find in the nonmoving party's favor. *Celotex*, 477 U.S. at 324; Anderson, 477 U.S. at 252.

> No longer are judges required to submit a question to a jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such character that it would warrant the jury in finding a verdict in favor of that party. . . . [T]here is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any evidence upon which a jury could properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed.

Anderson, 477 U.S. at 250.

The court is "required to view the facts and draw reasonable inferences in the light most favorable to the [nonmoving] party." *Scott v. Harris*, 550 U.S. 372, 378, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007). The court may not weigh evidence or make credibility determinations in analyzing a motion for summary judgment because those are "jury functions, not those of a judge." *Anderson*, 477 U.S. at 249-50. Nevertheless, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts.... Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial." *Scott*, 550 U.S. at 380 (internal quotation marks omitted) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)).

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In short, "summary judgment should be granted where the nonmoving party fails to offer evidence from which a reasonable [fact finder] could return a [decision] in its favor." *Triton Energy Corp. v. Square D Co.*, 68 F.3d 1216, 1220 (9th Cir. 1995).

B. There is No Evidence that the Decedent was *Ever* Exposed an Asbestos-Containing Product Manufactured, Sold, or Supplied by Edward Valves.

Plaintiffs' claims against Edward Valves fail because plaintiffs cannot show that the decedent ever worked with or around a product manufactured, sold or supplied by Edward Valves, which contained asbestos and contributed to his disease and death. Under applicable Washington law relating to asbestos personal injury cases, the plaintiff must identify the particular manufacturer of the product that allegedly caused the injury and "establish a reasonable connection between the injury, the product causing the injury, and the manufacturer of the product." *Lockwood v. AC&S, Inc.*, 109 Wash. 2d 235, 744 P.2d 605, 612 (1987).

In asbestos cases, plaintiffs may rely on circumstantial evidence that the manufacturer's products were the source of their asbestos exposure, but it is not enough to merely speculate that the manufacturer's product was the source of a decedent's asbestos disease. There must also be evidence of a causal link between that product and the injured party's asbestos exposure. *Van Hout v. Celotex Corp.*, 121 Wash. 2d 697, 853 P.2d 908, 913 (1993). Factual allegations must be enough to raise a right to relief above the speculative level. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) (citing 5 C. Wright & A. Miller, Federal Practice and Procedure § 1216, pp. 235-236 (3d ed. 2004)); *see also, Claytor v. Owens-Corning Fiberglass Corp.*, 662 A.2d 1374, 1384 (D.C. App. 1995) (court has the duty to withdraw a case from the jury when the necessary inferences of exposure to a particular defendant's asbestos product are so tenuous that it rests upon mere speculation and conjecture).

Affidavits which do not support the allegation that the plaintiff inhaled asbestos dust in places where, and at times when, a manufacturer's product was being installed or where dust from such products was airborne are insufficient to send a case to the jury. *Benshoof v. Nat'l Gypsum Co.*, 978 F.2d 475, 477 (9th Cir. 1992) (*cf. Lockwood*, 744 P.2d at 612-13, where

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testimony that the defendant's asbestos product was used and that asbestos dust from the product was inhaled was sufficient to withstand motion for directed verdict). Consequently, to survive summary judgment, plaintiffs here must produce admissible evidence that the decedent was actually exposed to respirable asbestos fibers originating from a Edward Valves product.

In *Lockwood*, the Court outlined a number of factors that determine whether there is sufficient evidence for a jury to find that causation has been established in an asbestos case:

> They should consider the evidence of plaintiff's proximity to the asbestos product when the exposure occurred and the expanse of the work site where asbestos fibers were released. They should also take into account the extent of time that the plaintiff was exposed to the product. As the time of exposure to asbestos dust increases, so does the severity of diseases associated with such exposure.

Lockwood, 744 P.2d at 613. "The mere existence of a scintilla of evidence in support of the non-moving party's position is not sufficient." *Triton Energy Corp.*, 68 F.3d at 1221.

In this case, there is no admissible evidence showing that that valve manufactured or sold by Edward Valves was present on one or more of the decedent's worksites, much less evidence that the valve contained original asbestos-containing gaskets or packing. As a result, plaintiffs have no way to establish that the decedent was ever exposed to asbestos from such a product. It follows that plaintiffs also cannot show the decedent was exposed to asbestos fibers from an Edward Valves product in sufficient concentrations to cause or contribute to his disease. Plaintiffs therefore cannot satisfy a single *Lockwood* factor, and their claims against Edward Valves should be dismissed with prejudice.

C. There is No Evidence that the Decedent's Disease was Caused by Exposure to an Edward Valves Product.

To avoid summary judgment, plaintiffs also must also show there is a causal link between the defendant's product and the injured party's disease. *Van Hout*, 853 P.2d at 913. That is, plaintiffs must offer evidence showing there was actual exposure to asbestos fibers from a Edward Valves product, and that the exposure was a substantial factor in causing the decedent's asbestos-related disease. As explained above, plaintiffs cannot provide evidence of even a single

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instance where the decedent worked with or around an asbestos-containing product for which Edward Valves is responsible. The absence of such evidence precludes plaintiffs' medical experts from drawing a causal connection between the decedent's illness and any Edward Valves product.

In addition to the *Lockwood* factors outlined above, plaintiffs must also prove medical causation of the alleged disease. To do so, plaintiffs must prove (1) the presence of a Edward Valves product that (2) contained or was used in conjunction with asbestos, (3) released fibers, (4) which were inhaled by the decedent, and (5) that the encounter was sufficient to be a substantial factor causing the decedent's asbestos-related disease. *See Mavroudis v. Pittsburgh-Corning Corp.*, 86 Wash. App. 22, 28, 935 P.2d 684, 689 (1997); *see also, Barabin v. Albany Int'l Corp.*, C07-1454RSL, 2009 WL 2578967, at *5 (W.D. Wash., Aug. 18, 2009) (unpublished) (Washington law requires plaintiffs to establish that exposure to asbestos from a manufacturer's product was a "substantial factor" in causing plaintiff's illness).

Here, again, there is no evidence of a physical nexus between the decedent and asbestos fibers from an Edward Valves product. There is no testimony regarding the decedent's proximity to an Edward Valves product, the duration of any such exposure, or the intensity of any such exposure. In the absence of that evidence, Edward Valves is entitled to summary judgment.

D. Edward Valves Did Not Have an Affirmative Duty to Warn of Asbestos Hazards for Products Supplied By Others.

In addition to the foregoing reasons to dismiss plaintiffs' claims against Edward Valves, there is no basis for plaintiffs' claim that Edward Valves had a duty to warn the decedent about potential hazards related to products manufactured and sold *by other companies*. In *Simonetta v. Viad Corp.*, 165 Wash. 2d 341, 197 P.3d 127 (2008), the Washington Supreme Court held that a manufacturer may not be held liable in common law, strict products liability, or negligence for failure to warn of the dangers of asbestos exposure resulting from another manufacturer's insulation applied to its products after sale of the products to the Navy. *Id.*, 165 Wash 2d at 348-

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63, 197 P.3d at 131-38. *See Schwartz v. Abex Corp.*, 106 F. Supp. 3d 626, 637 (E.D. Pa. 2015) (in *Simonetta*, "the Supreme Court of Washington determined that, 'the completed product was the evaporator as delivered by Viad to the Navy, sans [i.e., without] asbestos insulation.'").

In the companion case of *Braaten v. Saberhagen Holdings, et al.*, 165 Wash. 2d 373, 198 P.3d 493 (2008), the Court reached the same conclusion with regard to replacement gaskets or packing that were not supplied by the original equipment manufacturer, explaining:

> We hold that the general rule that there is no duty under common law products liability or negligence principles to warn of the dangers of exposure to asbestos in other manufacturers' products applied with regard to replacement packing and gaskets. The defendants did not sell or supply the replacement packing or gaskets or otherwise place them in the stream of commerce, did not specify asbestos-containing packing and gaskets for use with their valves and pumps, and other types of materials could have been used. In addition, the evidence is insufficient to show that Mr. Braaten was exposed to the original packing and gaskets supplied by these defendants. Accordingly, we reverse the Court of Appeals and reinstate the trial court's orders of summary judgment in favor of the defendants.

Id., 165 Wash. 2d at 380-81, 198 P.3d 495-96. The *Braaten* Court further explained:

> As we held in *Simonetta*, a manufacturer has no duty under common law products liability or negligence principles to warn of the dangers of exposure to asbestos in products it did not manufacturer and for which the manufacturer was not in the chain of distribution. These holdings apply here and foreclose the plaintiff's products liability and negligence claims based on failure to warn of the danger of exposure to asbestos (1) in insulation applied to pumps and valves the defendant-manufacturers sold to the Navy, where the manufacturers did not manufacture or sell the insulation and were not in the chain of distribution of it, and (2) in replacement packing and gaskets installed in or connected to the pumps and valves after they were installed aboard ships, where the manufacturers did not manufacture or sell the replacement packing and gaskets and were not in the chain of distribution of these products.

Id., 165 Wash. 2d at 398, 198 P.3d at 504. Thus, even if there was evidence that the decedent had worked around some other manufacturer's product that was used in connection with an Edward Valves product (which there is not), Edward Valves had no duty to provide a warning about that *other* product.

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E. Plaintiffs' Claims under "Any Other Applicable Theory of Liability" Should Be Dismissed.

Plaintiffs' claims of willful and wanton conduct, conspiracy, premises liability, and "any other applicable theory of liability" should be dismissed as inconsistent with Washington law. There is no evidence that Edward Valves was ever involved in any conspiracy or any other conduct giving rise to any such cause of action or theory of liability. There is no evidence that Edward Valves ever owned any premises where the decedent was exposed to asbestos. Because plaintiffs have not, and cannot, produce facts or legal arguments in support of any such claims against Edward Valves, all such claims should be dismissed with prejudice.

V. CONCLUSION

For the reasons and authorities stated above, Edward Valves respectfully requests that the Court grant this motion and issue an Order dismissing all of Plaintiffs claims against Edward Valves with prejudice.

DATED: January 24, 2019.

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DECLARATION OF SERVICE
(Varney)

I hereby certify that on January 24, 2019, I electronically filed the foregoing **MOTION FOR SUMMARY JUDGMENT OF DEFENDANT FLOWSERVE US, INC., SOLELY AS SUCCESSOR-IN-INTEREST TO EDWARD VALVES, INC.** with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all attorneys of record.

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I certify under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed this 24th day of January, 2019, at Portland, Oregon.

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